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Before the  
Federal Communications Commission  
Washington, D.C. 20554

In re Applications of )

AMERITECH CORP., )  
Transferor, )

AND )

SBC COMMUNICATIONS INC., )  
Transferee, )

CC Docket No. 98-141

For Consent to Transfer Control of )  
Corporations Holding Commission Licenses )  
and Lines Pursuant to Sections 214 )  
and 310(d) of the Communications Act )  
and Parts 5, 22, 24, 25, 63, 90, 95 and 101 )  
of the Commission's Rules )

**MEMORANDUM OPINION AND ORDER****Adopted: October 6, 1999****Released: October 8, 1999**

By the Commission: Commissioner Ness issuing a statement; Commissioners Furchtgott-Roth and Powell concurring in part, dissenting in part, and issuing separate statements; Commissioner Tristani issuing a statement.

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## I. INTRODUCTION

1. In this Order, we consider the joint applications filed by SBC Communications Inc. (SBC) and Ameritech Corporation (Ameritech) pursuant to sections 214(a) and 310(d) of the Communications Act of 1934, as amended (Communications Act),<sup>1</sup> for approval to transfer control of licenses and lines from Ameritech to SBC in connection with their proposed merger.<sup>2</sup> Before we can grant their applications, SBC and Ameritech (collectively, Applicants) must demonstrate that their proposed transaction will serve the public interest, convenience, and necessity.<sup>3</sup> After lengthy discussions with Commission staff and consideration of public comments in this proceeding, SBC and Ameritech supplemented their initial application by attaching to it proposed conditions representing a set of voluntary commitments.

2. We conclude that approval of the applications to transfer control of Commission licenses and lines from Ameritech to SBC is in the public interest because such approval is subject to significant and enforceable conditions designed to mitigate the potential public interest harms of their merger, to open up the local markets of these Regional Bell Operating Companies (RBOCs), and to strengthen the merged firm's incentives to expand competition outside its regions. We believe that the proposed voluntary commitments by SBC and Ameritech substantially mitigate the potential public interest harms while providing public interest benefits that extend beyond those contained in the original applications.

3. Specifically, we conclude in this Order that the proposed merger of these RBOCs threatens to harm consumers of telecommunications services by: (a) denying them the benefits of future probable competition between the merging firms; (b) undermining the ability of regulators and competitors to implement the pro-competitive, deregulatory framework for local telecommunications that was adopted by Congress in the Telecommunications Act of 1996; and (c) increasing the merged entity's incentives and ability to raise entry barriers to, and otherwise discriminate against, entrants into the local markets of these RBOCs.<sup>4</sup> Furthermore, the asserted benefits of the proposed merger, absent conditions, do not outweigh these significant harms, as described herein.

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<sup>1</sup> 47 U.S.C. §§ 214(a), 310(d).

<sup>2</sup> See *Merger of SBC Communications Inc. and Ameritech Corporation, Description of the Transaction, Public Interest Showing and Related Demonstrations* (filed July 24, 1998) (SBC/Ameritech July 24 Application).

<sup>3</sup> See 47 U.S.C. §§ 214(a), 310(d). See also *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18026-27, 18030-32 at paras. 1, 8-10 (1998) (*WorldCom/MCI Order*); *Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, 19987, 20000-04 at paras. 2, 29-32 (1997) (*Bell Atlantic/NYNEX Order*).

<sup>4</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.* (1996 Act).

4. The proposed conditions, however, change the public interest balance. We expect that with these conditions, competition in the provision of local exchange services, including advanced services, will increase both inside and outside the merged firm's region. Accordingly, assuming the Applicants' ongoing compliance with the conditions described in this Order, we find that the Applicants have demonstrated that the proposed transfer of licenses and lines from Ameritech to SBC serves the public interest, convenience, and necessity.

## II. EXECUTIVE SUMMARY

5. To implement the dismantling of the Bell System, seven Regional Bell Operating Companies were created in 1984. After the mergers of SBC with Pacific Telesis and Bell Atlantic with NYNEX, five RBOCs remain. The instant proceeding concerns the proposed transfer of licenses and lines attendant upon a proposed merger of two RBOCs, SBC and Ameritech. We conclude that, with the conditions adopted by this Order, the Applicants have demonstrated that the proposed transfer of licenses and lines from Ameritech to SBC will serve the public interest, convenience, and necessity. We also make the following determinations in support of this conclusion:

- Harms – The proposed merger of these RBOCs threatens to harm consumers of telecommunications services in three distinct, but interrelated, ways.
  - 1) The merger will remove one of the most significant potential participants in local telecommunications mass markets both within and outside of each company's region.
  - 2) The merger will substantially reduce the Commission's ability to implement the market-opening requirements of the 1996 Act by comparative practice oversight methods.<sup>5</sup> Contrary to the deregulatory, competitive purpose of the 1996 Act, this will, in turn, increase the duration of the entrenched firms' market power and raise the costs of regulating them.
  - 3) The merger will increase the incentive and ability of the merged entity to discriminate against its rivals, particularly with respect to the provision of advanced telecommunications services. This is likely to frustrate the Commission's ability to foster advanced services as it is directed to do by the 1996 Act.
- Benefits – The asserted benefits of the proposed merger do not outweigh the significant harms, detailed above. Specifically:

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<sup>5</sup> This Commission, the states, and competing firms often compare the practices of one major incumbent local exchange carrier against the other incumbents to inform regulatory or competitive decisions.

- 1) The Applicants have failed to demonstrate that the merger is necessary in order to obtain the benefits to local competition of the National-Local Strategy, a plan in which the merged firm will enter 30 out-of-region markets as a competitive LEC.
  - 2) Only a small portion of the Applicants' claimed cost-saving efficiencies, including procurement savings, consolidation efficiencies, implementation of best practices, faster and broader roll-out of new products and services, and benefits to employees and communities, are merger-specific, likely and verifiable.
  - 3) The only merger-specific benefits to product markets other than local wireline telecommunications markets, such as wireless services, Internet services, long distance and international services, and global seamless services for large business customers, relate to a somewhat increased pace of expansion and modest reductions in unit costs. Any benefits in these regards are both speculative and small.
- Conditions – On July 1, 1999, the Applicants supplemented their application by proffering a set of voluntary commitments that they agreed to undertake as conditions of approval of their proposed transfer of licenses and lines. Following a period of public comment regarding their proposed conditions, the Applicants substantially revised their commitments on August 27, 1999, and continued to refine those commitments in filings with the Commission on September 7, September 17, and September 29, 1999. Assuming satisfactory compliance, implementation of the attached final set of conditions will further the following goals:
    - 1) promoting advanced services deployment;
    - 2) ensuring that in-region local markets are more open;
    - 3) fostering out-of-region competition;
    - 4) improving residential phone service; and
    - 5) enforcing the Merger Order.

These commitments are sufficient to tip the scales, so that, on balance, the application to transfer licenses and lines should be approved.

- Wireless – SBC and Ameritech are required by the U.S. Department of Justice, and as a condition of this Order, to divest one of the cellular telephone licenses in seven Metropolitan Statistical Areas and seven Rural Service Areas where the two companies have overlapping cellular geographic service areas.

- International – The public interest will be served by transferring control of Ameritech's international section 214 authorizations to SBC, subject to the condition that SBC subsidiaries be classified as dominant international carriers in their provision of service on the U.S.-South Africa and U.S.-Denmark routes.
- Alarm Monitoring – Section 275 of the Communications Act does not require that the Ameritech BOCs lose their grandfathered right to be affiliated with an entity that is engaged in the provision of alarm monitoring services merely because the Ameritech BOCs will become affiliates of the SBC BOCs, which are not grandfathered. A forced divestiture of Ameritech's alarm monitoring subsidiary would be contrary to the intent of section 275.
- Cable – Section 652 of the Communications Act does not prohibit SBC from acquiring Ameritech's existing in-region cable overbuild operations.
- Service Quality – Any post-merger service quality concerns are adequately addressed by the Applicants' proffered commitments.
- Character/Requests for Hearing – Petitions to deny the applications do not raise a substantial or material question of fact that would warrant an evidentiary hearing regarding whether SBC or Ameritech possesses the requisite character to engage in a transfer of control of Commission licenses, or regarding any other matter related to this transaction.

### III. BACKGROUND

#### A. The Applicants

6. *Ameritech Corporation.* Ameritech, one of the original seven RBOCs<sup>6</sup> formed as part of the divestiture of AT&T's local operations, is the primary incumbent local exchange carrier (LEC) serving Illinois, Indiana, Michigan, Ohio, and Wisconsin. Ameritech, through its operating companies,<sup>7</sup> serves more than 20 million local exchange access lines, and had 1998 operating revenues in excess of \$17.1 billion.<sup>8</sup>

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<sup>6</sup> In this Order, we use the term "BOC" to refer to a Bell operating company as defined in the Communications Act, 47 U.S.C. § 153(4), and the term "RBOC" to refer to the original seven regional holding companies created by the breakup of AT&T. See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982).

<sup>7</sup> Ameritech's five local exchange operating companies are: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc. See SBC/Ameritech July 24 Application, Description of the Applicants and Their Existing Business, at 2.

<sup>8</sup> See Ameritech 1998 Annual Report (Selected Financial and Operating Data).



7. In addition to local exchange and exchange access services, Ameritech's operating companies provide a wide range of other services, including cellular, personal communications services (PCS), paging, security, cable television, Internet access, alarm monitoring and directory publishing services.<sup>9</sup> Ameritech provides cellular services to more than 3.5 million customers in 42 cellular markets throughout its five-state region and in other markets in Missouri, Hawaii and Kentucky, as well as PCS service in the Cleveland, Cincinnati, and Milwaukee metropolitan areas.<sup>10</sup> Ameritech also provides paging services to more than 1.5 million customers in its five-state region, and in two adjacent states, Missouri and Minnesota.<sup>11</sup> Through its Ameritech Interactive Media Services, Inc. subsidiary, Ameritech provides Internet services and products to over 66,000 customers,<sup>12</sup> while its cable television subsidiary, Ameritech New Media, Inc., provides competitive cable service to more than 200,000 consumers in over 75 communities in the Chicago, Cleveland, Columbus, and Detroit metropolitan areas.<sup>13</sup> Ameritech's SecurityLink by Ameritech, Inc. subsidiary is North America's second-largest security monitoring provider with more than one million residential and commercial accounts.<sup>14</sup> Finally, Ameritech has diverse overseas investments, which include direct or indirect financial interests in communications ventures in fifteen European countries, including Belgium, Denmark, Germany, Hungary, and Norway.<sup>15</sup>

8. Ameritech's subsidiaries hold numerous Commission licenses and operate lines used in interstate and international communications, including domestic and international lines authorized under section 214, and various Title III licenses necessary to operate cellular, paging, PCS, experimental radio, business radio, mobile radio, and microwave services, as well as earth station authorizations.<sup>16</sup> Through its subsidiaries, Ameritech is also authorized to operate international facilities-based and/or resale services originating outside the states in which Ameritech provides local exchange service.<sup>17</sup>

9. *SBC Communications Inc.* SBC, another of the original seven RBOCs, became the primary incumbent LEC serving Arkansas, Kansas, Missouri, Oklahoma, and Texas following the AT&T divestiture. In April 1997, SBC acquired Pacific Telesis Group, another RBOC, which was the primary incumbent LEC in California and Nevada.<sup>18</sup> In October 1998,

<sup>9</sup> SBC/Ameritech July 24 Application, Description of the Applicants and Their Existing Business, at 2.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See <http://www.ameritech.com/products/americast/whoware.html>.

<sup>14</sup> SBC/Ameritech July 24 Application, Description of the Applicants and Their Existing Business, at 3.

<sup>15</sup> *Id.*, Table 15 "Selected International Investments" (listing select Ameritech international investments).

<sup>16</sup> *Id.*, Categories of Ameritech's FCC Authorizations.

<sup>17</sup> See *id.*, Application of Ameritech Corporation and SBC Communications Inc., for Authority, Pursuant to Section to Section 214 of the Communications Act of 1934, as Amended, to Transfer Control of Ameritech Corporation, a Company Controlling International Section 214 Authorizations (filed July 24, 1998)(SBC/Ameritech July 24 International Application).

<sup>18</sup> See *Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Pacific Telesis Group and its Subsidiaries*, Report No. LB-96-32, Memorandum Opinion and Order, 12 FCC Rcd 2624 (1997) (*SBC/PacTel Order*).

SBC acquired Southern New England Telecommunications Corporation (SNET), which was the primary incumbent LEC for most of Connecticut.<sup>19</sup> Together, SBC's operating companies<sup>20</sup> serve more than 35.7 million local exchange access lines in its eight-state region. In 1998, SBC's operating revenues exceeded \$28.7 billion.<sup>21</sup>

10. In addition to providing local exchange and exchange access services, SBC provides wireless, Internet access, out-of-region interLATA, cable television and directory publishing services.<sup>22</sup> SBC's principal wireless subsidiaries provide cellular, PCS, and paging services to more than 8.3 million subscribers throughout SBC's eight-state region and in several out-of-region markets.<sup>23</sup> SBC's Personal Vision subsidiary (d/b/a SNET Americast) provides cable television service in Connecticut.<sup>24</sup>

11. SBC also provides interexchange (long distance) service to more than 900,000 customers in Connecticut through its SNET subsidiary.<sup>25</sup> In February 1999, SBC entered into an alliance with Williams Communications, Inc., in which SBC will acquire \$500 million, or approximately ten percent, of Williams' shares, giving SBC access to Williams' nationwide fiber-based broadband network.<sup>26</sup> Finally, SBC also holds international investments in communications ventures in France, Israel, Switzerland, the United Kingdom, Chile, Mexico,

<sup>19</sup> See *Applications for Consent to Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor, to SBC Communications, Inc., Transferee*, CC Docket No. 98-25, Memorandum Opinion and Order, 13 FCC Rcd 21292, 21294 at para. 3 (1998) (*SBC/SNET Order*).

<sup>20</sup> SBC's principal wireline subsidiaries are: Southwestern Bell Telephone Company (SWBT), Pacific Bell (PacBell), Nevada Bell, and The Southern New England Telephone Company (SNETel). See Application, Description of the Applicants and Their Existing Business, at 1.

<sup>21</sup> SBC 1998 Annual Report at 6 (Management's Discussion and Analysis of Financial Condition and Results of Operations).

<sup>22</sup> SBC/Ameritech July 24 Application, Description of the Applicants and Their Existing Business, at 1.

<sup>23</sup> "SBC 2Q Earnings Per Share Increase 15.7 Percent: Company Sees Strong Growth in Wireless, Data Customers," [www.sbc.com/News/Article.html?querv\\_type=article&querv=19990720-01](http://www.sbc.com/News/Article.html?querv_type=article&querv=19990720-01) (July 10, 1999). SBC's wireless operations added 305,000 net wireless subscribers during the second quarter of 1999, including 167,000 PCS customers in California and Nevada. *Id.* SBC subsidiary Southwestern Bell Mobile Services (SBMS) operates cellular systems in the Chicago, Boston and Baltimore/Washington metropolitan areas, and in upstate New York. Southwestern Bell Wireless, Inc., a subsidiary of SBMS, operates cellular and PCS systems within Texas, Missouri, Oklahoma, Kansas and Arkansas. SBC subsidiary Pacific Bell Mobile Services operates PCS systems in California and Nevada. SBC subsidiary SNET Cellular, Inc. provides cellular service in Rhode Island and portions of Massachusetts, and Springwich Cellular Limited Partnership serves Connecticut and other parts of Massachusetts. See SBC/Ameritech July 24 Application, Description of the Applicants and Their Existing Business, at 1; Map 30 "SBC/Ameritech Wireless Holdings." Earlier this year, SBC acquired Comcast Cellular Holdings, Co. (Comcast Cellular), which provides cellular and PCS services to more than 850,000 subscribers throughout Pennsylvania, New Jersey, Delaware, and Maryland. See *Applications of Comcast Cellular Holdings, Co., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer of Control of Licenses and Authorizations*, File Nos. 8-EX-TC-1999, *et al.*, Memorandum Opinion and Order, DA 99-1318 (July 2, 1999). Comcast Cellular also holds cellular licenses in the Joliet and Aurora/Elgin, Illinois metropolitan areas. *Id.*, at para. 9.

<sup>24</sup> See *SBC/SNET Order*, 13 FCC Rcd at 21294, para. 5.

<sup>25</sup> See *id.*, at para. 3.

<sup>26</sup> See SBC 1998 Annual Report at 3 (Letter from Edward E. Whitacre Jr., Chairman and CEO).

South Korea, Taiwan, and South Africa, as well as in two proposed trans-Pacific undersea cable systems linking China and Japan with the United States.<sup>27</sup>

### 1. A Changing Industry

12. In 1982, the United States District Court for the District of Columbia entered a consent decree in an antitrust suit entitled *United States v. AT&T Corp.*<sup>28</sup> The 1982 Consent Decree, also known as the "Modification of Final Judgment" (MFJ), when fully enforced in 1984, substantially dismantled what had formerly been an integrated end-to-end monopoly of U.S. telecommunications services, the Bell System. Before the MFJ, the Bell System provided local exchange telephone service to over 80 percent of all residential phone subscribers in the United States, and accounted for even higher shares of long distance service, phone plant equipment manufacture and customer premises equipment sales. For most Americans, the Bell System provided virtually all telecommunications needs. By fundamentally altering that environment, the MFJ, together with its underlying rationale, provides the central backdrop against which all telecommunications regulation takes place in this country, and, indeed, the measure against which we evaluate the merger before us.

13. The entry of the 1982 Consent Decree created SBC and Ameritech. The MFJ essentially divorced the Bell System's local exchange operations from its other lines of business by requiring the creation of seven regionally-based operating companies (*i.e.*, the RBOCs). These RBOCs were created as holding companies for the local operating companies that had been owned by AT&T and were forbidden from selling long distance services and information services, and from manufacturing or selling telecommunications equipment. Both SBC and Ameritech therefore are creations of the MFJ, not an outgrowth of natural market forces. Necessarily, then, the rationale behind the 1982 Consent Decree frames most of the issues raised by their proposed merger.

14. To put it simply, the Bell System was broken up because of two firmly held beliefs. One belief was that competition, rather than regulation, could best decide who would sell what telecommunications services at what prices to whom. The other belief was that the principal obstacles to realizing that competitive ideal were the incentive and ability of dominant local exchange carriers, who typically controlled virtually all local services within their regions, to wield exclusionary power against their rivals. The Department of Justice, the federal courts, and this Commission concluded that a firm controlling access to virtually all local phone customers in its region was very likely to exclude those who would directly compete with it and to discriminate against those, such as long distance service providers and equipment manufacturers, who might offer competitive ancillary services that the local exchange carrier also sought to offer. Further, decades of experimentation with various regulatory regimes had taught that regulators could not fully monitor and control such exclusionary and discriminatory

<sup>27</sup> SBC/Ameritech July 24 Application, Table 15 "Selected International Investments" (listing select SBC international investments).

<sup>28</sup> See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982).

behavior. Rather, structural solutions – in this case the divorce of AT&T from its local operating companies – were vitally necessary.

15. The other seminal event in post-World War II telecommunications regulation was the enactment of the 1996 Act. When Congress passed the 1996 Act, it codified the standards and principles established by the Bell System break-up and set forth a framework that governs us today. Two aspects of the 1996 Act in particular drive our analysis of this license transfer application and the companies' subsequent proposed conditions.

16. First, Congress not only firmly ratified the pro-competitive thrust of the MFJ and embraced its rationale, but it extended the goals of the decree. The MFJ principally sought to further competition in ancillary fields, such as long distance, equipment manufacturing, and information services. Based in part on successful state experiments with limited introduction of local competition, the 1996 Act determined that it would also be U.S. telecommunications policy to foster competition nationally in the provision of local exchange and exchange access services to all telephone subscribers, including residential units. From the date of the enactment of the 1996 Act, this Commission, in conjunction with state public utility commissions, has been statutorily charged with opening up local markets to competition, on the specific premise that without regulatory oversight, the incumbent LECs would be able to discriminate against and exclude local rivals.

17. Second, Congress directed this Commission and the state commissions to achieve these competitive ends by deregulatory means. The 1996 Act introduced into our telecommunications law a clearly-stated duty of dominant LECs to interconnect with their competitors – for example, to unbundle their networks and provide advance notice of changes in their network design, to permit rivals to resell incumbent LEC services at a discount, and to allow their competitors to collocate on their premises.<sup>29</sup> Incumbent LECs must accommodate their rivals, not predate against them, and the process of accommodation is to be through commercial negotiation – not regulatory fiat – where possible. Thus, Congress instructed this Commission and state regulators to effectuate the transition from monopoly markets to competitive markets in a deregulatory manner. This means that regulations enforcing interconnection on fair and equitable terms should not impose detailed regulatory oversight on incumbents. Our mandate is to achieve competition, not to devise a complex regulatory regime. We assess this transfer of control application, and its associated conditions, against this mandate.

## **2. State of Local Competition in SBC and Ameritech Regions**

18. At the time of its merger application in July 1998, SBC served 33.4 million access lines.<sup>30</sup> SBC provided approximately 650,000 resold lines to competitors,<sup>31</sup> commonly referred

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<sup>29</sup> 47 U.S.C. §251(c).

<sup>30</sup> SBC/Ameritech July 24 Application, Description of the Applicants and Their Existing Businesses at 1. Since filing its merger application, SBC has added 2.3 million access lines as a result of its merger with SNET. *SBC/SNET Order*, 13 FCC Rcd at 21294, para. 3. In addition, access line growth in SBC's region has continued

to as competitive LECs. Most of these access lines were in California, Texas, and Kansas.<sup>32</sup> In addition, SBC provided 60,000 unbundled loops, most of which were in the former PacTel region<sup>33</sup> -- 52,000 in California and 3,600 in Nevada, compared with only 330 in Texas.<sup>34</sup> SBC also reported that it was providing approximately 353,000 interconnection trunks, greater than 90 percent of which were in California and Texas,<sup>35</sup> and 343 unbundled switch ports.<sup>36</sup>

19. SBC stated that there were more than 50 active competitors in its region and that it had entered into 374 interconnection and resale agreements, 93 percent of which were adopted without state arbitration.<sup>37</sup> SBC noted 548 collocation arrangements (490 physical/58 virtual) in 173 wire centers, plus 443 pending arrangements.<sup>38</sup> SBC stated that competitors had installed 547 switches<sup>39</sup> (vs. approximately 2800 that SBC owns) and more than 6,500 route miles of fiber in its region.<sup>40</sup>

20. At the time of its application, Ameritech served more than 20 million access lines.<sup>41</sup> It provided approximately 635,000 resold lines to competitors, 92 percent of which were in three of its five states. Only six percent of these resold lines were in Wisconsin, and two percent were in Indiana.<sup>42</sup> Ameritech reported provisioning 94,600 unbundled loops.<sup>43</sup> Fifty-seven percent of these unbundled loops were in a single state, Michigan.<sup>44</sup> Only 900 such lines had been unbundled in Wisconsin and no lines had been unbundled in Indiana.<sup>45</sup> Ameritech also reported provisioning 180,000 interconnection trunks and "zero" unbundled switch ports.<sup>46</sup>

21. Ameritech stated that there were more than 50 active competitors in its region, and that it had entered into 175 interconnection and resale agreements with 39 carriers.<sup>47</sup>

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apace. SBC's wireline operations added 1.4 million access lines in the 12-month period ended March 31, 1999.

"SBC First-Quarter Earnings Per Share Increase 14.3 Percent,"

[www.sbc.com/News/Article.html?querv\\_type=article&querv=19990420-017](http://www.sbc.com/News/Article.html?querv_type=article&querv=19990420-017) (visited Aug. 19, 1999). Residential lines grew 3.9 percent and business voice grade equivalent lines -- which include both voice lines and data circuits -- grew 15.9 percent in the first quarter of this year. *Id.* SBC reported a total of 37.7 million access lines as of April 20, 1999. *Id.*

<sup>31</sup> SBC/Ameritech July 24 Application, Table 1 (Open Market Measures in SBC and Ameritech Regions).

<sup>32</sup> *Id.* at Table 3 (SBC Local Landline Competitors by State and Method of Entry).

<sup>33</sup> *Id.*, Description of the Transaction at 77 & Table 3.

<sup>34</sup> *Id.* at Table 3.

<sup>35</sup> *Id.* at Tables 1 & 3.

<sup>36</sup> *Id.* at Table 1.

<sup>37</sup> *Id.*, Description of the Transaction at 76-77 & Table 1.

<sup>38</sup> *Id.*, Description of the Transaction at 77 & Table 1.

<sup>39</sup> *Id.*, Description of the Transaction at 86-87.

<sup>40</sup> *Id.*, Description of the Transaction at 87.

<sup>41</sup> *Id.*, Description of the Applicants and Their Existing Businesses at 2.

<sup>42</sup> *Id.* at Tables 1 & 4 (Ameritech Local Landline Competitors by State and Method of Entry).

<sup>43</sup> *Id.*, Description of the Transaction at 77.

<sup>44</sup> *Id.* at Table 4.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at Table 1.

<sup>47</sup> *Id.*, Description of the Transaction at 77 & Table 1.

Ameritech reported 113 physical collocations and 166 virtual collocations in Ameritech wire centers, with 77 more scheduled for activation in the third quarter of 1998.<sup>48</sup> According to Ameritech, this represents 23 percent of Ameritech wire centers, which serve 63 percent of business lines and 50 percent of residential lines in Ameritech's service area.<sup>49</sup> Ameritech stated that competitors had installed 120 switches (vs. approximately 1500 that Ameritech owns) and more than 5,000 route miles of fiber in Ameritech's region.<sup>50</sup>

22. Although Ameritech had only 60 percent as many access lines as SBC, Ameritech and SBC had an equivalent number of resold lines, and Ameritech had approximately 50 percent more unbundled loops, as of July 1998. As noted, however, not a single unbundled loop was reported in Indiana.<sup>51</sup> SBC provided proportionately more interconnection trunks, but nearly two-thirds of those trunks were in California,<sup>52</sup> and more than 90 percent were in Texas and California. Ameritech's provisioning of interconnection trunks was spread more evenly across its region.<sup>53</sup>

23. Ameritech's supply to competitors of 635,00 resold lines and 94,600 unbundled loops represents about 3.5 percent of its 20 million access lines,<sup>54</sup> whereas SBC's 650,000 resold lines and 60,000 unbundled loops represents approximately 2 percent of SBC's 33.4 million

<sup>48</sup> *Id.*, Description of the Transaction at 77.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*, Description of the Transaction at 87.

<sup>51</sup> The Indiana Utility Regulatory Commission (IURC) states that "*there is virtually no competition for local telephone service in the state of Indiana.*" IURC June 16 Comments at 6 (emphasis in original). The IURC found it "[p]articularly disturbing" that, as of December 31, 1998, Ameritech Indiana had lost less than 500 voice grade access lines as UNEs in a service area that included 2.2 million access lines. *Id.* at 3. Ameritech Indiana was providing 460 UNE loops and 16,980 resold lines (approximately 0.7 percent of total voice grade access lines). *Id.* at 7. The IURC cited, as other indications that facilities-based competition is non-existent, the fact that competing carriers had collocation arrangements in only 19 of Ameritech Indiana's 160 switching centers at the end of 1998, and that less than half (46 percent) of Ameritech Indiana's voice grade access lines were served by a switching center in which at least one competitor had a collocation arrangement. *Id.*

<sup>52</sup> See Consumer Coalition Comments, Affidavit of Susan M. Baldwin and Helen E. Golding (Baldwin & Golding Affidavit), at 9-10 (comparing estimated facilities-based competitive LEC penetration of 1.5 percent in PacTel region, which SBC acquired in April 1997, with estimated 0.6 percent facilities-based penetration in SWBT region).

<sup>53</sup> SBC/Ameritech July 24 Application, Table 4.

<sup>54</sup> Reducing these numbers to the level of an individual state, the Michigan PSC noted in its February 1998 Report on Local Telephone Interconnection that competitive LECs in Ameritech Michigan's service area operated 200,000 lines in Michigan: 20,000 with UNEs, and 180,000 through resale. See Report to the Michigan Governor and Legislature on Public Act of 1991 as amended section 353, Report on Local Telephone Interconnection (Feb. 1998), <http://ermisweb.cis.state.mi.us/mpsc/comm/localcon.htm> (visited Aug. 19, 1999). These 200,000 lines represented approximately 3.77 percent of Ameritech's total 5.3 million lines in Michigan, and were mainly concentrated in the Grand Rapids, Flint and Detroit areas. *Id.* See also IURC June 16 Comments at 9 (estimating that, at the end of 1998, approximately 3 percent of total voice grade access lines in Ameritech's service areas in Illinois and Michigan were served by a competitive LEC, either through total service resale or UNEs).

access lines.<sup>55</sup> SBC estimated that, as of December 1998, it had provided 800,000 lines through resale, and facilities-based competitive LECs had self-provisioned an additional 600,000 lines.<sup>56</sup> SBC counts the loss to facilities-based competitive LECs through a variety of means, including directory listings, 911/E911 databases, and telephone numbers ported to competitors.<sup>57</sup>

24. In their Joint Reply to comments regarding proposed merger conditions,<sup>58</sup> SBC and Ameritech assert that local communications markets have opened further, and competition has intensified, in the year since they filed their initial merger application in July 1998.<sup>59</sup> Specifically, SBC and Ameritech state that they signed an additional 250 interconnection agreements during that year, and that competitors in Ameritech's region now serve 738,000 lines using their own facilities, 154,000 using unbundled network elements (an increase of 63 percent since the numbers reported in the merger application), and nearly one million lines through resale (an increase of 57 percent).<sup>60</sup> SBC and Ameritech note industry estimates that are much more conservative than the Applicants' original estimates concerning competitors' deployment of switches – *i.e.*, more than 175 in SBC's region (compared with 547 estimated by SBC in its application) and more than 75 in Ameritech's region (compared with 120 estimated by Ameritech in its application). However, those sources also indicate greater fiber deployment by competitive LECs in SBC's region as of 1999 (more than 10,000 route miles versus 6,500 estimated by SBC).<sup>61</sup>

25. It has been more than three and-a-half years since Congress passed the 1996 Act in an attempt to stimulate competition in local telephone markets. Competition has been slow to emerge, but there have been recent signs that momentum is building. For instance, the Commission's Local Competition Report notes that revenues of local service competitors increased from \$2.2 billion at the end of 1997 to \$3.6 billion at the end of 1998.<sup>62</sup> The report estimates that competitive LECs are gaining market share, but that incumbent LECs retain 96 percent of local service revenues.<sup>63</sup> Moreover, the Report indicates that competitive LECs have

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<sup>55</sup> These numbers are in line with industry estimates concerning competitive entry into SBC's markets. *See, e.g.*, "Competitors have swiped only 2.2% of SBC's phone lines, compared with a 3.4% loss at Bell Atlantic." "The Last Monopolist," *Business Week*, 76, 77 (Apr. 12, 1999).

<sup>56</sup> Letter from Zeke Robertson, SBC, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141, Att. 2 at 4 (filed Mar. 30, 1999).

<sup>57</sup> SBC/Ameritech July 24 Application, Affidavit of Stephen M. Carter, Att. 1 at 3-5.

<sup>58</sup> Joint Reply of SBC Communications Inc. and Ameritech Corporation to Comments Regarding Merger Conditions, filed July 26, 1999 (SBC/Ameritech July 26 Reply Comments).

<sup>59</sup> *Id.* at 12.

<sup>60</sup> *Id.* As of March 1999, SBC reported that it had provisioned more than 73,800 unbundled loops and more than 590,000 one- and two-way interconnection trunks to competitive LECs. Letter from Todd F. Silbergeld, SBC to Magalie Roman Salas, Secretary, FCC, CC Docket No. 97-121, Att. at 2-3 (filed Apr. 6, 1999). SBC estimated 830,000 resold lines. *Id.* These updated figures represent a 23 percent increase in provision of unbundled loops and a 28 percent increase in resale since the merger application.

<sup>61</sup> SBC/Ameritech July 26 Reply Comments at 13.

<sup>62</sup> *Local Competition*, Federal Communications Commission, Common Carrier Bureau, Industry Analysis Div., at Table 2.1 (Aug. 1999) ("*Local Competition Report*").

<sup>63</sup> *See id.* at 1, 12.

been most successful in the market for specialized services such as special access and local private line services, which are provided to business customers.<sup>64</sup> Aggregate competitive LEC use of resold incumbent LEC lines predominates over their use of unbundled loops by a factor of approximately 10 to 1 and according to data provided by ILECs, 40 percent of the resold lines serve residential customers.<sup>65</sup> In addition, facilities-based competitive LECs appear to have concentrated in more urbanized areas.<sup>66</sup>

26. For its part, in response to the 1996 Act, SBC appears to have adopted an acquisition strategy. Within weeks of passage of the 1996 Act, SBC announced its agreement to merge with PacTel, one of the other six Baby Bells.<sup>67</sup> Last year, SBC merged with SNET, the primary incumbent LEC in Connecticut. The instant merger would add a third Baby Bell to the original SWBT and PacTel. Congress may or may not have contemplated such horizontal moves when it replaced the MFJ with the 1996 Act, but Congress did signal a clear intent that the desire of BOCs to enter the long distance markets within their existing regions would provide a powerful incentive to open their local markets to competition. This is embodied in the so-called "carrot-and-stick" approach taken in section 271 of the Act, which requires satisfaction of a 14-point checklist for determining whether local markets are open to competition before a BOC may be allowed to originate in-region interLATA services within a particular state.

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<sup>64</sup> *Id.* at 1. See AT&T Oct. 15 Petition at 11 (citing a recent study by the Consumer Federation of America, *Stonewalling Local Competition: The Baby Bell Strategy to Subvert the Telecommunications Act of 1996* (1998) at 20, for the proposition that local competition affects little more than one percent of the local market and an even lower percentage of residential service). See also Letter from Antoinette Cook Bush, Ameritech, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141, at 11 (July 9, 1999) (stating that "there is a much higher level of competition in the business market than the residential market in Indiana" because Indiana has among the lowest retail residential local exchange rates in the country).

<sup>65</sup> See *Local Competition Report* at 2, 22-23. See Consumer Coalition Oct. 15 Comments at 6 (noting that even according to the applicants' own estimates in their application, less than one percent of access lines had been lost to competitors through unbundling); Telecommunications Resellers Association Oct. 15 Comments at 11-12 (referring to SBC's and Ameritech's unbundled loops as a "small fraction of a single percent of the network access lines SBC and Ameritech currently have in service").

<sup>66</sup> *Id.* at 5-6; see also *Local Competition*, Federal Communications Commission, Common Carrier Bureau, Industry Analysis Div., at 2 (Dec. 1998) (noting that the Atlanta, Dallas, Los Angeles, and New York City LATAs each had more than 20 competitive LECs with the numbering resources necessary to provide mass market switched services over their own facilities, while 30 of the nation's more rural LATAs had no such competitive LECs). The IURC states that facilities-based competition is virtually non-existent in Indiana, and that competition has been much slower to develop in that state than in Ameritech states with larger MSAs such as Chicago, Detroit, Cleveland, and Milwaukee. IURC June 16 Comments at 8, 11. Indiana's largest MSA, Indianapolis, is only the 28<sup>th</sup> largest in the nation, and its second largest, Fort Wayne, ranks 81<sup>st</sup>, compared with Chicago (3<sup>rd</sup>), Detroit (8<sup>th</sup>), Cleveland (13<sup>th</sup>), and Milwaukee (26<sup>th</sup>). *Id.* at 11-12. Furthermore, five of the seven facilities-based competitors in Indiana have all of their switches located in Indianapolis and its surrounding cities. Letter from Antoinette Cook Bush, Ameritech, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141, Att. at 12 (July 9, 1999).

<sup>67</sup> The PacTel merger was announced April 1, 1996 and consummated April 1, 1997. See Joint Opposition of SBC and Ameritech, Martin Kaplan Reply Aff. at 2.



27. SBC and Ameritech have separately engaged in failed attempts to convince regulators that their local markets are open to competition within the meaning of section 271.<sup>68</sup> This Commission denied SBC's application for in-region interLATA authority in Oklahoma in June 1997,<sup>69</sup> finding that SBC had not met the threshold requirement under section 271 that SBC be providing access and interconnection to a facilities-based competing provider of local exchange service to residential and business subscribers (the "Track A" requirement under section 271).<sup>70</sup> The Texas and California commissions issued orders in mid-1998 establishing collaborative processes among SBC, competitive LECs and commission staff to resolve outstanding issues regarding SBC's compliance with section 271 in those states. Those processes are ongoing and have resulted in significant progress with respect to operations support systems (OSS), performance measurements and penalties, collocation, and provision of unbundled network elements (UNEs). SBC states that it expects to receive section 271 approval for Texas and California first, and that approvals for its five remaining states would follow shortly thereafter.<sup>71</sup>

28. This Commission denied Ameritech's application for in-region interLATA authority in Michigan in August 1997, citing deficiencies with respect to access to OSS, interconnection, and access to 911 and E911 services.<sup>72</sup> Ameritech is not actively pursuing section 271 approvals in any of its states at this time as evidenced by the fact that Ameritech has not filed in any state section 271 proceedings since 1997.<sup>73</sup> On January 21, 1999, the Illinois Commerce Commission issued an order dismissing its section 271 proceeding because of the staleness of the record.<sup>74</sup>

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<sup>68</sup> See AT&T Oct. 15 Petition at 14, 18; Consumer Coalition Oct. 15 Comments at 8; Consumer Coalition Oct. 15 Comments, Baldwin & Golding Affidavit, at 12-16, 18; Sprint Petition at 52-54; Telecommunications Resellers Association Oct. 15 Comments at 11; Time Warner Telecom Corp. Oct. 15 Petition at 3-5.

<sup>69</sup> *Application by SBC Communications, Inc., Pursuant to Section 271 of the Communications Act*, 12 FCC Rcd 8685 (1997) (*Oklahoma Order*).

<sup>70</sup> *Id.* at para. 1. The Commission further concluded that SBC was foreclosed from obtaining interLATA authority under the alternative route, Track B (where no competing carrier has requested access and interconnection), because SBC had already received several requests for access and interconnection from competing carriers. See *id.* Although the *Oklahoma Order* did not further examine SBC's compliance with the requirements of section 271, the Commission did note that the record in that proceeding was "replete with allegations from competitors such as Brooks [Fiber Properties, Inc.] and Cox [Communications, Inc.] that their efforts to enter the local exchange market [had] been frustrated by the actions of SBC." *Id.* at para. 64.

<sup>71</sup> See Narrative Response of SBC Communications Inc. to the FCC's 1/5/99 Request for Supplemental Information filed Feb. 2, 1999 (CC Docket No. 98-141), at 32.

<sup>72</sup> See *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act*, 12 FCC Rcd 20543 (1997), para. 5. The U.S. Department of Justice and the Michigan Public Service Commission had both recommended denial of the application for similar reasons. *Id.* at paras. 32-33, 41-42.

<sup>73</sup> Letter from Antoinette Cook Bush, Ameritech, to Magalie Roman Salas, Secretary, FCC, dated March 24, 1999. On November 2, 1998, Ameritech did file a comprehensive performance plan (including performance measurements, calculation methodologies, benchmarks and remedies for failure to perform as required) in a separate docket in Michigan. *Id.*

<sup>74</sup> *Id.*

29. All evidence suggests that competition has been slow to emerge in the territories of these Baby Bells and that not all geographic areas, and not all types of customers, are receiving the benefits of competition. Furthermore, this merger application comes at a critical juncture when competitive LECs may shortly be able to take advantage of more favorable market conditions resulting from: (1) recent court decisions;<sup>75</sup> (2) final prices for interconnection, UNEs and resale that have been determined in state cost proceedings;<sup>76</sup> and (3) extensive section 271 collaborative processes supervised by state commissions. A number of competitive LECs have noted in *ex parte* discussions with Commission staff that their original interconnection agreements with SBC and Ameritech expire this year, and that they are facing negotiation of "second-generation" interconnection agreements that will govern their relationships with these companies (or the combined company) over the next several years. With this background in mind, we turn in the following sections to discussion of the harms that are likely to result from this merger, which is proposed at a critical time in the evolution of local competition that Congress envisioned.

### B. The Merger Transaction and Review Process

30. *Proposed Transaction.* Under the Agreement and Plan of Merger (Merger Agreement), dated May 10, 1998, Ameritech would become a first-tier, wholly-owned subsidiary of SBC in a stock-for-stock merger.<sup>77</sup> Following the merger, SBC would own all the stock of Ameritech, and SBC itself would be owned 57.5 percent by the pre-merger stockholders of SBC and 42.5 percent by the pre-merger stockholders of Ameritech.

31. Together, SBC and Ameritech would serve more than 55.5 million local exchange access lines, representing approximately one-third (31.9 percent) of the nation's total access lines.<sup>78</sup> SBC and Ameritech as a combined company would have more than 200,000 employees and annual revenues in excess of \$45 billion, based on December 1998 statistics from both companies. In other words, SBC and Ameritech combined would be the second largest telecommunications company in the country behind only AT&T, as measured by revenues. Based on the extensive breadth of SBC's and Ameritech's operations, their proposed merger requires the approval of several government agencies, including the DOJ, state public utility commissions, the European Commission, and this Commission.

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<sup>75</sup> See, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (upholding Commission's rulemaking authority to carry out local competition provisions of the Telecommunications Act of 1996, upholding "pick and choose" rule, and remanding Commission's application of "necessary and impair" standard of the 1996 Act to network element unbundling rules).

<sup>76</sup> See, e.g., IURC June 16 Comments at 10-11 & n.25 (reporting that the IURC established a permanent wholesale discount for Ameritech Indiana (21.46 percent) on February 25, 1999, and that final unbundled network element rates had not yet been established for Ameritech in Indiana or Ohio).

<sup>77</sup> The Merger Agreement specifies that Ameritech shareholders will receive newly-issued shares of SBC at a fixed exchange ratio of 1.316 shares of SBC common stock for each share of Ameritech common stock. Application, Description of Transaction, at 1. See also SBC/Ameritech July 24 Application, Agreement and Plan of Merger.

<sup>78</sup> See SBC 1998 Annual Report at 3 (Letter from Edward E. Whitacre Jr., Chairman and CEO).

## 1. Department of Justice Review

32. The DOJ reviewed the proposed transaction as part of the pre-merger review process under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.<sup>79</sup> On March 23, 1999, DOJ, pursuant to a proposed consent decree, required the Applicants to divest cellular properties in overlapping geographic areas.<sup>80</sup> This condition was deemed necessary to prevent a substantial lessening of competition as a result of the merger in “markets for mobile wireless services in Illinois, Indiana, and Missouri.”<sup>81</sup> Recognizing further that Ameritech planned to provide wireline service in St. Louis, and that “no one else is providing such service in St. Louis,” DOJ required that Ameritech’s, not SBC’s, cellular assets be divested in St. Louis, and that the purchaser of these assets “has the capability of competing effectively in the provision of local exchange telecommunications services and long distance telecommunications services in the St. Louis area.”<sup>82</sup> On April 5, 1999, Ameritech announced that it was selling twenty cellular holdings to a joint venture of GTE Consumer Services Inc. (GCSI), a subsidiary of GTE, and Georgetown Partners, which would eliminate all cellular overlaps.<sup>83</sup>

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<sup>79</sup> See 15 U.S.C. § 18a. DOJ specifically noted that its approval is only one step in the overall merger review process for the proposed transaction. See United States Department of Justice, “Justice Department Requires SBC to Divest Cellular Properties in Deal with Ameritech and Comcast,” Press Release (Mar. 23, 1999) (DOJ Mar. 23 Press Release). DOJ outlined its role in the merger review process as follows:

“The Antitrust Division’s suit was filed under Section 7 of the Clayton Act, which prohibits mergers that may substantially lessen competition, and reflects the Division’s view about the antitrust issues raised by the proposed merger. Other government agencies, including the Federal Communications Commission and the public utility commissions of Illinois, Indiana, and Ohio, are also reviewing the SBC/Ameritech transaction under the laws which those agencies enforce.”

*Id.*

<sup>80</sup> *United States v. SBC Communications Inc. and Ameritech Corporation*, Case No. 99-0715, Stipulation and Final Judgment (D.D.C., filed Mar. 23, 1999) (Proposed Final Judgment).

<sup>81</sup> Proposed Final Judgment at 2.

<sup>82</sup> *Id.* In its Complaint, DOJ referenced a bundled product of local, long distance and cellular services that Ameritech had planned to provide to its residential cellular customers prior to the merger and indicated that “[t]here is no alternative source of such a bundled product in the St. Louis area at present.” *United States v. SBC Communications Inc. and Ameritech Corporation*, Case No. 99-0715, Complaint, at para. 21 (D.D.C. filed Mar. 23, 1999) (DOJ Mar. 23 Complaint). Thus, DOJ acknowledged, “[t]he acquisition would prevent the realization of this new competition.” *Id.*

<sup>83</sup> See “Ameritech Sells Cellular Properties to GTE and Georgetown Partners for \$3.27 Billion,” Press Release (Apr. 5, 1999), [http://www.ameritech.com/media/release/view/0.1038,2556|1\\_2.00.html](http://www.ameritech.com/media/release/view/0.1038,2556|1_2.00.html). See *In re Applications of Ameritech Corporation, Transferor, and GTE Consumer Services, Inc., Transferee, for Consent to Transfer of Control of Licenses and Authorizations*, Memorandum Opinion and Order, DA 99-1677, 1999 WL 635,724 (WTB 1999).

## 2. State and International Review

33. The proposed merger of SBC and Ameritech also requires the approval of, or notification to, a number of state governing bodies and the European Commission. The status of these proceedings is summarized below.<sup>84</sup>

34. *Ohio.* Pursuant to the laws of Ohio, the Applicants filed for approval of their proposed transaction from the Public Utility Commission of Ohio (PUCO). On April 8, 1999, PUCO approved with conditions the proposed merger pursuant to a stipulated settlement agreement negotiated among several parties. The conditions imposed by PUCO, among other things, require that the Applicants: (1) freeze residential rates through January 2002; (2) compete for residential and business customers in four markets outside of Ameritech's current service territory; (3) improve service quality; (4) increase infrastructure investment; (5) maintain current employment levels for two years; and (6) offer a promotional rate for unbundled loops and resold service for a certain period of time linked to Ameritech's loss of residential access lines to competitors.<sup>85</sup> PUCO also required the combined entity to make available in Ohio the level of interconnection it obtains as a new entrant outside its service territory or which it provides in another state as an incumbent.<sup>86</sup> Finally, SBC and Ameritech agreed to meet certain competitive, operations support systems, and service quality benchmarks, or face monetary penalties.<sup>87</sup>

35. *Illinois.* On July 24, 1998, pursuant to Illinois law, the Applicants filed a joint application requesting approval of their proposed reorganization from the Illinois Commerce Commission (ICC). The ICC held numerous formal hearings on the application, and approved the merger on September 23, 1999, subject to several conditions.<sup>88</sup> The conditions imposed by

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<sup>84</sup> In addition to the state proceedings outlined below, the Public Service Commission of Wisconsin examined the proposed merger for the purpose of filing comments with this Commission. See Comments of the Public Service Commission of Wisconsin, CC Docket No. 98-141 (filed May 19, 1999). In Indiana, the IURC on its own motion, on September 2, 1998, initiated an investigation into the proposed merger to determine whether the IURC had authority to approve the merger. See *Investigation of the Commission's Own Motion into all Matters Relating to the Merger of Ameritech Corporation and SBC Communications Inc.*, Cause No. 41255, Order (IURC Sept. 2, 1998). The IURC ruled on May 5, 1999, that the proposed merger required its approval. See *Investigation of the Commission's Own Motion into all Matters Relating to the Merger of Ameritech Corporation and SBC Communications Inc.*, Cause No. 41255, Order (IURC May 5, 1999). The Applicants appealed this ruling, and the Indiana Supreme Court held that the IURC lacks jurisdiction under state law over a transaction by a public utility's holding company, such as SBC's acquisition of Ameritech. See *Indiana Bell Telephone Co., Inc. v. Indiana Utility Regulatory Comm'n*, 715 N.E.2d 351 (Ind. 1999).

<sup>85</sup> See *Joint Application of SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation, and Ameritech Ohio for Consent and Approval of a Change of Control*, Public Utilities Comm'n of Ohio Case No. 98-1082-TP-AMT, Opinion and Order, at 18-19, 25-27, 30-31 (Apr. 8, 1999) (*Ohio PUC Merger Order*). The Applicants agreed to enter the local exchange markets in the Cincinnati, Hudson, Delaware, and Lebanon areas.

<sup>86</sup> *Id.* at 28.

<sup>87</sup> *Id.* at 10, 15-16, 22.

<sup>88</sup> See *SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation, Illinois Bell Telephone Company d/b/a Ameritech Illinois, and Ameritech Illinois Metro, Inc.*, Docket No. 98-0555, Order (ICC Sept. 23, 1999) (*ICC Merger Order*).

the ICC address, among other things, performance measurements and associated penalties, enhanced operations support systems, shared transport, most-favored nation interconnection arrangements, residential xDSL service deployment, service outages and associated penalties, network infrastructure investment, 911 practices, and updated cost studies and cost allocation manuals. In addition, for three years, the combined company is required to allocate 50 percent of the net merger-related savings in Illinois to competitors and retail customers. The ICC also relied on a series of voluntarily commitments by the Applicants that, among other things, require the combined firm to retain Ameritech's brand identity and regional employment levels, make charitable and community contributions and establish community enrichment programs in the state (*e.g.*, a consumer education fund, a community technology fund, and community computer centers).

36. *Nevada.* On July 29, 1999, the Public Utilities Commission of Nevada (Nevada PUC) ordered SBC to submit its proposed merger to the commission for review and approval.<sup>89</sup> SBC thereafter filed a special application with the Nevada PUC seeking either authorization to acquire Ameritech or a finding by the Nevada PUC that it lacks jurisdiction over the transaction.<sup>90</sup> The Applicants and the Nevada PUC staff subsequently agreed to a settlement agreement that was approved by the Nevada PUC on September 1, 1999. Pursuant to the stipulated agreement, no merger-related transaction costs will be passed on to Nevada ratepayers and, among other things, the merged firm must keep the Nevada PUC apprised of its implementation of any FCC merger conditions, retain the Nevada Bell brand identity, and buy locally where possible.<sup>91</sup>

37. *European Commission.* In a June 1998 letter to the Applicants, the European Commission's Merger Task Force confirmed that the proposed merger would not conflict with applicable antitrust guidelines.<sup>92</sup>

38. *Others.* In addition to these governing bodies, the Applicants sought approval of or made notification to: (i) certain state public utilities commissions in connection with Ameritech's authorizations to provide intrastate interexchange service in all 45 out-of-region states and local exchange service in eight out-of-region states; (ii) certain local franchising authorities in jurisdictions in which Ameritech has received franchises for competitive cable

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<sup>89</sup> See *Petition of the Regulatory Operations Staff for an Order to Show Cause Why SBC Communications Inc. Should Not be Ordered to File an Application for Merger Approval in Compliance with NRS 704.329*, Docket No. 99-4031, Order (Nev. PUC rel. Aug. 2, 1999).

<sup>90</sup> See *Special Application of SBC Communications Inc. for Authorization to Acquire Ameritech Corporation Pursuant to an Agreement and Plan of Merger or a Finding that the Commission Lacks Jurisdiction over the Acquisition*, Docket No. 99-8010, Notice of Application and Prehearing Conference (Nev. PUC Aug. 10, 1999).

<sup>91</sup> See *Special Application of SBC Communications Inc. for Authorization to Acquire Ameritech Corporation Pursuant to an Agreement and Plan of Merger or a Finding that the Commission Lacks Jurisdiction over the Acquisition*, Docket No. 99-8010, Order (Nev. PUC Sept. 1, 1999) (*Nevada PUC Merger Order*).

<sup>92</sup> See "European Regulators Signal Clear Path for SBC-Ameritech Merger," SBC and Ameritech News Release (July 23, 1998) (SBC/AIT July 23 Press Release).

systems; and (iii) certain regulatory authorities in select European countries in which SBC or Ameritech holds investments.<sup>93</sup>

### 3. Commission Review

39. As noted above, SBC and Ameritech filed joint applications on July 24, 1998, pursuant to sections 214(a) and 310(d) of the Communications Act, requesting Commission approval of the transfer of control to SBC of licenses and lines owned or controlled by Ameritech or its affiliates or subsidiaries. Following the Commission's Public Notice of July 30, 1998,<sup>94</sup> thirty-five parties filed timely comments supporting or opposing the application, or petitions to deny the application.<sup>95</sup> Nine parties, including the Applicants, filed reply comments. In addition, the Commission held a series of three public forums at which a number of parties, including (a) the Applicants, (b) states, consumer groups, community organizations, and industry participants, and (c) economists, could present their views on the proposed merger.<sup>96</sup>

40. On October 2, 1998, the Bureau adopted a protective order under which third parties would be allowed to review confidential or proprietary documents that SBC or Ameritech submitted.<sup>97</sup> Commission staff also requested, and obtained, the Applicants' consent to review the documents that SBC and Ameritech had submitted to DOJ as part of its Hart-Scott-Rodino review process.

41. In January, 1999, Commission staff requested additional documentation and information from the Applicants.<sup>98</sup> The supplemental request, among other things, sought documents and information on the following subjects: (1) Applicants' out-of-region entry activities; (2) Applicants' brand name awareness; (3) perceived demand for end-to-end telecommunications services; (4) Applicants' investment projects; (5) plans for implementing the Applicants' National-Local Strategy; (6) the profitability of serving out-of-region residential and

<sup>93</sup> Application, Description of the Transaction, at 103-4. See also SBC/AIT July 23 Press Release (noting merger approval from the national regulatory authorities of Germany, Denmark and Belgium).

<sup>94</sup> *SBC Communications, Inc. and Ameritech Corporation Seek FCC Consent for a Proposed Transfer of Control and Commission Seeks Comment on Proposed Protective Order Filed by SBC and Ameritech*, CC Docket No. 98-141, Public Notice, DA 98-1492 (July 30, 1998).

<sup>95</sup> The parties that filed formal pleadings in this proceeding are listed in Appendix A. In addition to those formal pleadings, we received hundreds of informal comments through *ex parte* submissions.

<sup>96</sup> See "Commission to Hold En Bancs Regarding Telecom Mergers," Public Notice, DA 98-2045 (Oct. 9, 1998); "Commission to Hold En Bancs Regarding Telecom Mergers," Public Notice, DA 98-2415 (Dec. 2, 1998); "Chief Economist Names Participants on Economic Round Table Regarding Telecom Mergers," Public Notice, DA 99-119 (Jan. 25, 1999).

<sup>97</sup> *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications Inc., Transferee*, CC Docket No. 98-141, Order Adopting Protective Order, DA 98-1952 (Oct. 2, 1998).

<sup>98</sup> See Letter from Carol E. Matthey, Chief, Policy and Program Planning Division, Common Carrier Bureau, to Dale (Zeke) Robertson, Senior Vice President, SBC Telecommunications Inc. (Jan. 5, 1999) (CCB Jan. 5 SBC Letter); Letter from Carol E. Matthey, Chief, Policy and Program Planning Division, Common Carrier Bureau, to Lynn Shapiro Starr, Executive Director, Federal Relations, Ameritech Corp. (Jan. 7, 1999) (CCB Jan. 7 Ameritech Letter).

small business customers; and (7) the relationship between the companies' National-Local Strategy and section 271 authorizations.<sup>99</sup> The Applicants filed certain of the Hart-Scott-Rodino documents, and other confidential documents, with the Commission under seal, with a redacted version placed in the public record. The portion of this Order that discusses confidential documents that were used in the Commission's decision-making process has been issued under seal as Appendix B.

42. On April 1, 1999, FCC Chairman William Kennard notified the Applicants that Commission staff had raised a number of significant issues with respect to potential public interest harms and questions about the claimed competitive and consumer benefits of their proposed transaction.<sup>100</sup> Accordingly, Chairman Kennard invited SBC and Ameritech and other interested parties to explore with Commission staff, on a cooperative and public basis, whether it would be possible to craft conditions that would address the public interest concerns raised by the Application.<sup>101</sup>

<sup>99</sup> See CCB Jan. 5 SBC Letter; CCB Jan. 7 Ameritech Letter. On May 10, 1999, Sprint alleged that the Applicants had withheld from the Commission certain documentation relevant to the Commission's document request letters. See Letter from Philip L. Verveer, Counsel for Sprint Communications Company, Willkie Farr & Gallagher, to William E. Kennard, Chairman, FCC (filed May 10, 1999). In response, the Commission requested that the Applicants submit certain of the identified documents, which Ameritech subsequently submitted. See Letter from Carol E. Matthey, Chief, Policy and Program Planning Division, Common Carrier Bureau, to Lynn Shapiro Starr, Executive Director, Federal Relations, Ameritech Corp. (May 19, 1999); Letter from Antoinette Cook Bush, Counsel to Ameritech Corporation, to Magalie Roman Salas, Secretary, FCC (filed May 20, 1999).

<sup>100</sup> See Letter from William E. Kennard, Chairman, FCC, to Richard C. Notebaert, Chairman and Chief Executive Officer, Ameritech Corporation and Edward E. Whitacre, Jr., Chairman and Chief Executive Officer, SBC Communications Inc., CC Docket No. 98-141 (Apr. 1, 1999). In that letter, the Chairman specified the following public interest concerns:

- How can the Commission be assured that the merger will not interfere with the companies' willingness and ability to fully open their local markets to competition in accordance with the Communications Act (Act)?
- How can the Commission be assured that the merger would promote the objective of the Telecommunications Act of 1996 to encourage competition in all telecommunications markets?
- How can the Commission be assured that the public will promptly receive the claimed benefits from the proposed "national/local strategy" in view of section 271 of the Act?
- How can the Commission be assured that the merger will not adversely affect the Commission's ability to fulfill its responsibilities under the Communications Act by reducing its ability to "benchmark" the performance and capabilities of telecommunications carriers?
- How can the Commission be assured that the proposed combination will serve the Communications Act's public interest mandate by improving overall consumer welfare?

*Id.* at 2.

<sup>101</sup> See also Letter from U.S. Senators Mike DeWine (R-OH), Herb Kohl (D-WI), Strom Thurmond (R-SC) and Patrick Leahy (D-VT) to William Kennard, FCC Chairman, dated Sept. 16, 1998 (expressing concern by leading members of U.S. Senate Antitrust Subcommittee about telecommunications industry mergers, and urging the Commission to "search for creative, but non-intrusive ways to limit the anticompetitive effects of these deals while emphasizing the procompetitive aspects."). The Senators stated that if a merger is justified on the basis of the prospect of increased competition by the merged parties, then the Commission "should consider how to guarantee that the competitive promises of the merging parties are kept – without unduly interfering in the legitimate business decisions of the respective companies." *Id.* at 1. The Senators suggested that in certain circumstances, this may be

43. Accepting the Chairman's invitation,<sup>102</sup> representatives of SBC and Ameritech held a series of discussions with Commission staff to explore the possibility of the Applicants strengthening their application by agreeing to certain voluntary public interest commitments.<sup>103</sup> During this time, Commission staff also met with other interested parties who expressed views on the severity of potential public interest harms and possible mitigating conditions.<sup>104</sup>

44. On May 6, 1999, the Common Carrier Bureau held a public forum where Commission staff and representatives of SBC and Ameritech reported on the progress of discussions and received further input on the need for, and composition of, any potential conditions.<sup>105</sup> Interested parties also expressed opinions on potential conditions through record submissions.

45. Based on the input received from Commission staff and third parties, SBC and Ameritech supplemented their initial Application by submitting on July 1, 1999 an "integrated package of conditions" which they claimed would satisfy potential public interest concerns and lead to Commission staff support of their Application.<sup>106</sup> More than 50 parties filed timely

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best accomplished "by clearly written, easily enforceable conditions for post-merger actions by the parties; in other cases, pre-merger conditions may provide more certainty." *Id.*

<sup>102</sup> See Letter from Edward E. Whitacre, Jr., SBC Communications Inc. and Richard C. Notebaert, Ameritech Corporation, to Honorable William E. Kennard, Chairman, FCC, CC Docket No. 98-141 (Apr. 7, 1999). See also Statement of FCC Chairman William Kennard on Ameritech and SBC Response to the Chairman's Request for a Dialogue (rel. Apr. 7, 1999).

<sup>103</sup> See, e.g., Letter from Todd F. Silbergeld, SBC Telecommunications, Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (April 12, 1999) (indicating discussion of legal standard for merger review, pro-competitive aspects and certain concerns of proposed merger, and general purpose of any conditions); Letter from Todd F. Silbergeld, SBC Telecommunications, Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (May 5, 1999) (indicating discussion of potential conditions concerning opening local markets to competition and advanced services, as well as the duration of potential conditions); Letter from Paul K. Mancini, SBC, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (June 17, 1999) (indicating discussion of potential conditions concerning OSS, collocation, and performance measures).

<sup>104</sup> See, e.g., Letter from Karen J. Hardie, Ohio Consumers' Counsel, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (Apr. 23, 1999) (indicating discussion of residential competition); Letter from Patrick J. Donovan, Swidler Berlin Shereff Friedman on behalf of CoreComm Limited, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (Apr. 30, 1999) (indicating discussion of residential rates, burden of negotiating multiple interconnection agreements, collocation expense and delay, access to unbundled network elements, resale, OSS, and enforcement); Letter from A. Renee Callahan, Willkie Farr & Gallagher on behalf of Sprint Communications Company, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (Apr. 30, 1999) (indicating discussion of the need for specific incumbent LEC inputs to offer advanced services).

<sup>105</sup> See, e.g., Commission Announces Public Forum on SBC Communications Inc. and Ameritech Corporation, Applications for Transfer of Control, CC Docket No. 98-141, Public Notice, DA 99-810 (rel. Apr. 28, 1999); SBC-Ameritech Public Forum Extended for Second Day, CC Docket No. 98-141, Public Notice, DA 99-837 (rel. May 4, 1999). See also Statement of FCC Chairman William E. Kennard on Conditions for SBC-Ameritech Merger (rel. May 6, 1999).

<sup>106</sup> See Letter of Richard Hetke, Senior Counsel, Ameritech Corporation, and Paul K. Mancini, General Attorney and Assistant General Counsel, SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (filed July 1, 1999) (SBC/Ameritech July 1 *Ex Parte*). Specifically, in their reply comments in response to public comment on their proffered conditions, the Applicants state that they will comply with the



comments and 14 parties filed reply comments addressing the Applicants' proposed commitments.<sup>107</sup> SBC and Ameritech subsequently clarified their commitments on August 27, 1999, and in further *ex parte* filings in September.<sup>108</sup>

#### IV. PUBLIC INTEREST FRAMEWORK

46. Pursuant to sections 214(a) and 310(d) of the Communications Act, the Commission must determine whether the Applicants have demonstrated that the public interest would be served by transferring Ameritech's numerous licenses and lines used in interstate or foreign communications to SBC.<sup>109</sup> As discussed below, we must weigh the potential public interest harms of the proposed transaction against the potential public interest benefits to ensure that the Applicants have shown that, on balance, the merger serves the public interest, convenience and necessity.<sup>110</sup>

47. Section 214(a) of the Communications Act generally requires carriers to obtain from the Commission a certificate of public convenience and necessity before constructing, acquiring, operating or engaging in transmission over lines of communication, or before discontinuing, reducing or impairing service to a community.<sup>111</sup> In this case, section 214(a) requires the Commission to find that the "present or future public convenience and necessity require or will require" SBC to operate the acquired telecommunications lines, and that "neither the present nor future public convenience and necessity will be adversely affected" by the discontinuance of service from Ameritech.<sup>112</sup> Section 310(d) provides that no construction

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commitments "to assuage concerns that the merger's benefits will not materialize and to address any remote, speculative possibility that competition in some markets may be threatened." SBC/Ameritech July 26 Reply Comments at 19.

<sup>107</sup> See *Pleading Cycle Established for Comments on Conditions Proposed by SBC Communications Inc. and Ameritech Corporation for their Pending Application to Transfer Control*, CC Docket No. 98-141, Public Notice (rel. July 1, 1999). The parties filing comments and reply comments are listed in Appendix A.

<sup>108</sup> See Letter from Richard Hetke, Ameritech Corp. and Paul K. Mancini, SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (filed Aug. 27, 1999) (SBC/Ameritech Aug. 27 *Ex Parte*); Letter from Richard Hetke, Ameritech Corp. and Paul K. Mancini, SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (filed Sept. 7, 1999) (SBC/Ameritech Sept. 7 *Ex Parte*); Letter from Richard Hetke, Ameritech Corp. and Paul K. Mancini, SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (filed Sept. 17, 1999) (SBC/Ameritech Sept. 17 *Ex Parte*).

<sup>109</sup> 47 U.S.C. §§ 214(a), 303(r), 310(d). See *WorldCom/MCI Order*, 13 FCC Rcd at 18030, para. 8; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20000, para. 29.

<sup>110</sup> See *WorldCom/MCI Order*, 13 FCC Rcd at 18031-32, para. 10.

<sup>111</sup> 47 U.S.C. § 214(a).

<sup>112</sup> 47 U.S.C. § 214(a). See *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone and Telecommunications Alliance*, CC Docket No. 97-11; AAD File No. 98-43, Report and Order in CC Docket No. 97-11 and Second Memorandum Opinion and Order in AAD File No. 98-43, FCC 99-104 (rel. June 30, 1999) (continuing to require Commission approval for transfers of control, even though blanket section 214 entry certification and streamlined section 214 exit certification have been granted for domestic carriers). In their joint application to transfer control of the domestic section 214 authority held by Ameritech Illinois Metro, Inc., the Applicants also "apply for any authorization the Commission may deem

permit or station license may be transferred, assigned, or disposed of in any manner except upon a finding by the Commission that the "public interest, convenience, and necessity will be served thereby."<sup>113</sup> The Commission therefore must determine that the proposed transfer of licenses from Ameritech to SBC "serves the public interest, convenience, and necessity" before it can approve the transaction.<sup>114</sup>

48. The public interest standard of sections 214(a) and 310(d) involves a balancing process that weighs the potential public interest harms of the proposed transaction against its potential public interest benefits.<sup>115</sup> The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.<sup>116</sup> In applying this public interest test, the Commission considers four overriding questions: (1) whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision;<sup>117</sup> (2) whether the transaction would result in a violation of Commission rules;<sup>118</sup> (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act, or would interfere with the objectives of that and other statutes;<sup>119</sup> and (4) whether the merger promises to yield

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necessary under section 214 of the Communications Act for the transfer of control to SBC of domestic lines, now controlled by Ameritech and its subsidiaries, that are used for the provision of interstate services." Application, Part 63 Joint Application for Authority, Pursuant to section 214 of the Communications Act of 1934, as amended, to Transfer Control of Domestic Section 214 Authority, at 2 n.2.

<sup>113</sup> 47 U.S.C. § 310(d).

<sup>114</sup> 47 U.S.C. § 310(d).

<sup>115</sup> See *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 157.

<sup>116</sup> *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, Memorandum Opinion and Order, 14 FCC Rcd at 3160, 3169-70, para. 15 (1999) (*AT&T/TCI Order*). See also *WorldCom/MCI Order*, 13 FCC Rcd at 18031, para. 10 n.33 (citing 47 U.S.C. § 309(e) (burdens of proceeding and proof rest with the applicant); *American Telephone and Telegraph Co. and MCI Communications Corporation Petitions for the Waiver of the International Settlements Policy*, File No. USP-89-(N)-086, Memorandum Opinion and Order, 5 FCC Rcd 4618, 4621, para. 19 (1990) (applicant seeking a waiver of an existing rate bears the burden of proof to establish that the public interest would be better served by the grant rather than the denial of the waiver request); *LeFlore Broadcasting Co., Inc.*, Docket No. 20026, Initial Decision, 66 FCC 2d 734, 736-37, paras. 2-3 (1975) (on the ultimate issue of whether the applicants have the requisite qualifications and whether a grant of the application would serve the public interest, as on all issues, the burden of proof is on the licensees).

<sup>117</sup> See, e.g., *AT&T/TCI Order*, 14 FCC Rcd at 3221-24, paras. 130-136 (concluding that AT&T's acquisition of TCI, following its acquisition of Teleport, would not violate the buy-out restriction contained in section 652(a) of the Communications Act, which prohibits a local exchange carrier from acquiring more than a ten percent financial interest in an overlapping cable operator); *SBC/NET Order*, 13 FCC Rcd 21292, 21309-10, para. 36 (stating that "in order to comply with section 271, SNET and its subsidiaries must cease originating long distance traffic in SBC's current seven-state region."). See also *infra* Section VIII.C. (Alarm Monitoring).

<sup>118</sup> See, e.g., *AT&T/TCI Order*, 14 FCC Rcd at 3207-08, paras. 98-99, n.287 (acknowledging that AT&T's acquisition of TCI would implicate the Commission's commercial mobile radio service (CMRS) spectrum cap, 47 C.F.R. § 20.6); 14 FCC Rcd at 3177-81, paras. 31-40 (affirming that a merged AT&T-TCI would still be subject to the Commission's rules protecting competitive access to cable programming, 47 C.F.R. §§ 76.1000-76.1004). See also *infra* discussion concerning spectrum cap in Section VIII.A. (Wireless Services).

<sup>119</sup> See, e.g., *AT&T/TCI Order*, 14 FCC Rcd at 3224-26, paras. 137-39 (examining the merger's effect on the preservation and advancement of the Commission's universal service goals and concluding that AT&T's planned deployment of cable telephony furthers the goal of providing equal and expanded access to advanced